CASES BEFORE INTERNATIONAL COURTS AND TRIBUNALS

Corporate Criminal Liability under International Law

The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon

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Abstract
Relying on the Tribunal’s inherent powers, the Appeals Panel of the Special Tribunal for Lebanon decided in two cases, New TV S.A.L. and Akhbar Beirut S.A.L., that the Tribunal has jurisdiction over corporations for the offence of contempt. They decided so despite the absence of a clear provision explicitly granting such jurisdiction. This is the first time an international criminal tribunal asserts jurisdiction over legal persons. The article critically presents the Appeals Panel’s findings and places them in their historical and international context. Although limited in scope, the decisions are of great significance as business and human rights developments at the international level have emphasized the need for enhanced corporate accountability.

1. Introduction
Obstruction of the administration of justice may take many forms.1 Among such offences are ‘giving false testimony (perjury), non-compliance with court orders or obligations towards the court, presenting false evidence and intimidating witnesses’.2 In common law systems, these offences are usually categorized as ‘contempt of court’. In common law countries, the judiciary possesses an inherent and highly flexible contempt power. By contrast, in countries

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2 Ibid.
following the civil law tradition contempt and the sanctions that may be imposed to those found guilty of it is codified in statute.\(^3\)

Unsurprisingly, since these offences appear to exist in the judicial systems of most countries, they also exist under international criminal law. Over the last few years, international criminal tribunals have developed a solid body of jurisprudence relating to offences against the administration of justice and have taken them extremely seriously.\(^4\) Importantly, what is at stake in these proceedings is not simply a vague and perhaps difficult to grasp notion of respect for the Tribunal or the judges. Instead,

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\text{[o]ne could go so far as to say that certain prosecutions, such as those against persons who reveal the identities of disclosed witnesses, are even necessary for the success of the court going forward, as this deters possible offenders and in turn increases witnesses' confidence in the court being able to protect them post-testimony.}\(^5\)
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The New TV S.A.L. and Akhbar Beirut S.A.L. cases at the Special Tribunal for Lebanon (hereafter, STL or the Tribunal) provide cases in point. In January 2014, the Contempt Judge at the STL, Judge David Baragwanath, issued orders in lieu of indictment against four persons, two natural persons and two corporate persons. The orders relate first to the broadcast of TV programmes on Al Jadeed TV, operated by the private company New TV S.A.L., and on the subsequent online publication of the programmes on the video sharing website YouTube. Secondly, they relate to information published in Al Akhbar, a newspaper operated by another private company, Akhbar Beirut S.A.L. This information was also published on the paper’s website.\(^6\) Both the TV programme and the newspaper mentioned ‘names asserted to be those of alleged confidential witnesses in the Tribunal’s proceedings’.\(^7\) The indictment led to two separate cases. One is against a legal person, New TV S.A.L., and a natural person, New TV S.A.L.’s Deputy Head of News and Political Programmes Manager, Ms Karma Khayat. The other is against another legal person, Akhbar Beirut S.A.L. and another natural person, Akhbar Beirut S.A.L.’s Editor-in-Chief, Ibrahim Al-Amin.\(^8\)

In the indictment, Judge Baragwanath concluded that there were ‘sufficient grounds to proceed for contempt’ against these four persons as there was enough \textit{prima facie} evidence that the publication of witnesses’ names constituted ‘wilful interference with the administration of justice in breach of Rule

\(^3\) Ibid., at 631–632.
\(^5\) Ibid., at 767.
\(^6\) Redacted version of decision in proceedings for contempt with orders in lieu of an indictment (STL-14-05/1/CJ/), Appeals Chamber, 31 January 2014, § 3 (hereafter, ‘Orders in lieu of an indictment’). A part related to a third set of events was redacted out and no information is available on it. This commentary focuses only on the first two sets of events.
\(^7\) Ibid., § 4.
\(^8\) Ibid. The cases are STL-14-05 and STL-14-06, respectively.
He then referred the case to an *amicus curiae* prosecutor and disqualified himself from hearing the charges. Judge Nicola Lettieri was designated as Contempt Judge in both cases.\(^9\)

In June 2014, the defence for New TV S.A.L. and Karma Khayat presented a preliminary motion challenging jurisdiction of the Tribunal against New TV S.A.L. and asking that all charges be dropped against the company. The crux of their argument was that ‘the Tribunal lacks jurisdiction to charge and try New TV S.A.L. as there is no legal basis in the Statute of the Tribunal... and Rules or under international criminal law in general to institute criminal proceedings against a legal person.’\(^11\) In July 2014, Judge Lettieri found in favour of the defence on this point and dismissed all charges against New TV S.A.L. on the ground that Rule 60bis applies to natural persons only, and not to corporate entities (hereafter, ‘New TV S.A.L. Decision’).\(^12\)

Later that month, the prosecution appealed this decision (hereafter, ‘New TV S.A.L. Appeal’).\(^13\) In October 2014, an Appeals Panel (composed of three judges designated pursuant to a roster) upheld the appeal, and effectively reversed Judge Lettieri’s decision (hereafter, ‘the New TV S.A.L. Appeal Decision’). According to the Appeals Panel, ‘it is in the interests of justice to interpret the Tribunal’s personal jurisdiction under Rule 60bis as encompassing legal persons.’\(^14\) One member of the Appeals Panel dissented.\(^15\) As it is the first time an international tribunal envisages the criminal liability of corporations, the *New TV S.A.L. Appeal Decision* arguably makes a decisive contribution to the development of corporate accountability under international law.

In the twin case against Akhbar Beirut S.A.L., the defence presented a similar preliminary motion challenging jurisdiction.\(^16\) In response to this motion, Judge Lettieri found in favour of the defence and, as in his decision in *New TV S.A.L.*, concluded that the case against Akhbar Beirut S.A.L. ought to be

9 Ibid.


12 Decision on Motion challenging jurisdiction and on request for leave to amend order in lieu of an indictment, *New TV S.A.L. and Khayat* (STL-14-05/PT/CJ), Contempt Judge, 24 July 2014 (hereafter, ‘New TV S.A.L. Decision’).


15 Dissenting opinion of Judge Walid Akoum, Decision on Interlocutory Appeal concerning personal jurisdiction in contempt proceedings, *New TV S.A.L. and AI Khayat* (STL-14-05/PT/AP/AR126.1) (hereafter, ‘Judge Akoum’s Dissenting opinion’).

16 Preliminary Motion presented by counsel assigned to represent Akhbar Beitut S.A.L. and Mr Ibrahim Mohamed Ali Al-Amin, *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin* (STL-14-06/PT/CJ), Contempt Judge, 18 August 2014.
dropped due to lack of jurisdiction (hereafter, ‘Akhbar Beirut S.A.L. Decision’). This, arguably, is a rather bold decision on his part given that in the period between the filing of the motion by the defence (August 2014) and the Akhbar Beirut S.A.L. Decision (November 2014) the Appeals Panel in the New TV S.A.L. Appeal Decision has found that the Tribunal actually has jurisdiction against legal persons in contempt cases. Thus, Judge Lettieri deliberately refused to apply the findings of the Appeals Panel. He put forward four reasons for doing so: First, he insisted on the fact that the New TV S.A.L. Appeal Decision was a unique, isolated decision and did not rest on established international jurisprudence. Secondly, he considered that in the absence of a rule of stare decisis under international criminal law, the New TV S.A.L. Appeal Decision was only relevant for that particular case, and not for the second one. Thirdly, he emphasized that the decision of the Appeals Panel was not unanimous, and therefore carried less authority than an unanimous decision would have. Finally, he distinguished the two cases on the facts and seemed to consider that it was less problematic to drop the case against Akhbar Beirut S.A.L. than it was to drop the case against New TV S.A.L. because Akhbar Beirut S.A.L.’s co-accused was the most senior person in the company and not, as in New TV S.A.L., an employee, albeit a senior one. This was based on the Appeal Panel’s decision according to which prosecution of a natural person alone could be said to potentially lead to unacceptable impunity for criminal actions in that case.

Unsurprisingly, the prosecution appealed this decision. In January 2015, another Appeals Panel (in which the dissenting Judge Akoum had been replaced, but the other two Judges still remained), following the same reasoning as in the case against New TV S.A.L., upheld the charge against Akhbar Beirut S.A.L. (hereafter, ‘Akhbar Beirut S.A.L. Appeal Decision’). On the specific issue of whether the Contempt Judge was bound by the New TV S.A.L. Appeal Decision, the Appeals Panel noted that it would have been preferable and important for judicial certainty as well as to avoid the fragmentation of the law for the Contempt Judge to have applied the reasoning of the Appeals Panel.
Judge Nosworthy wrote a particularly strongly worded separate and partially dissenting opinion on the issue, in which she forcefully argued that the Appeals Decision in *New TV S.A.L.* was binding and that the Contempt Judge ‘was not entitled to disregard it’ in *Akhbar Beirut S.A.L.*

The *New TV S.A.L.* and *Akhbar Beirut S.A.L.* cases raise two distinct sets of issues. One has to do with the contours of the right to freedom of expression. While freedom of expression is a fundamental human right, it can be limited under certain conditions, for example, on public policy grounds. Therefore, the question at hand is whether circulating confidential information, such as names of witnesses to appear before the Tribunal, constitutes a violation of the right. In turn, this raises the question of the validity of the prosecution for contempt of court. If the events prompting prosecution are within the scope of the right to freedom of expression then there is no reason why they should lead to prosecution. This question is classic in instances of alleged contempt.

While the STL has yet to reach a decision on this particular point, the orders in lieu of indictment, issued in January 2014, delve into the area in relation to the specific context in which the STL operates.

The second set of issues, one on which the Tribunal has now reached final conclusions in two separate appeal decisions in *New TV S.A.L.* and *Akhbar Beirut S.A.L.*, and on which the present article focuses, has to do with the jurisdiction of the STL over legal persons, in this case — private media companies. This issue forms part of a much wider discussion, which has been at the forefront of international law in recent years, that of corporate liability under international law, and specifically under international human rights law and international criminal law. The question of the existence, or not, of corporate liability under international law, in turn, is a key aspect of the current debates on the developing area of business and human rights. In this context, and as the STL is the first international tribunal to look into the criminal liability of corporations as such, its findings were much awaited. To make matters more interesting, the eventual outcome of the appeals, which saw the Tribunal asserting jurisdiction over corporations, even if only for contempt, was ‘completely unexpected’.

The article is structured as follows: Section 2 places the cases into their historical context. Section 3 presents the main aspects of the appeal decisions.

27 See e.g. Art. 19(2)(b) of the International Covenant on Civil and Political Rights; Art. 10(2) of the European Convention on Human Rights; Art. 13(2)(b) of the American Convention on Human Rights.
28 For an overview of historic cases on this, see B.J. Cavanaugh, ‘Civil Liberties and the Criminal Contempt Power’, 19 *Criminal Law Quarterly* (1977) 349—365, at 358—360.
29 Orders in lieu of an indictment, *supra* note 6, §§ 14—17.
Finally, Section 4 discusses the cases’ possible consequences for the future of corporate criminal liability under international law.

2. A Historical Overview of Corporate Criminal Liability under International Law

Since the 1990s, the impact of business operations upon human rights, particularly of large multinational companies, with parent companies typically domiciled in the West but with operations (direct operations or via subsidiaries) in the developing world, have attracted a significant amount of attention at the international level. Following the failure of two separate initiatives, the drafting in 1982 of a United Nations (UN) Code of Conduct for Transnational Corporations and the 2003 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, the latest initiative, the UN Guiding Principles on Business and Human Rights, which the UN Human Rights Council endorsed in 2011, appears to have been marginally more successful. If anything, these moves have influenced other initiatives at the regional level, such as the redrafting of the Organization of Economic Co-operation and Development Guidelines for Multinational Enterprises, and the European Union Commission’s revamped definition of Corporate Social Responsibility, which break from voluntarism and more firmly embrace a human rights approach.

While important, these international initiatives, in themselves, do not directly impact and in any event do not provide judicial remedies for victims of corporate human rights violations. Indeed, and among other problems, one of the key issues facing victims of corporate human rights abuse is access to justice. Often these victims are not in a position to bring claims against or to request the prosecution of the companies in their own countries. This is

34 OECD Guidelines for Multinational Enterprises (OECD, 2011).
because the state itself can be the main perpetrator of the abuse, making the companies operating within its territory complicit in the abuse, but not the principal offenders. In such a scenario, it is difficult to envisage how victims can obtain justice before that very state’s judicial system. The allegations against oil companies Total and Unocal for their involvement in human rights violations in complicity with the military regime in Burma provide a clear example of this. Cases against Total and Unocal needed to be brought in third countries, the United States, France and Belgium.\(^{37}\) Even in instances where the state itself is not seen as perpetrator but more as passive enabler, inertia, corruption, poverty and generally disempowerment explain the difficulties victims face in obtaining justice for the abuses they have suffered at the hands of corporations. Moreover, transnational litigation, whereby victims seek to obtain justice in the countries of incorporation of the multinational companies, or at least in Western countries in which they operate, is ridden with difficulties and rarely results in proper redress.\(^ {38}\) Finally, despite important developments mentioned above, there is still no international mechanisms to deal with corporate human rights abuses — the international human rights legal framework remaining largely state centred. The fact that justice often can be obtained neither in the country where the human rights violations have occurred, nor in a developed country, and certainly not at the international level, leads to a well-documented impunity gap.\(^ {39}\)

The developing area of business and human rights covers the various ways in which that impunity gap can be bridged by enhancing corporate accountability for human rights violations. One aspect of corporate accountability is the controversial development of corporate criminal liability at the international level.\(^ {40}\) None of the contemporary international criminal tribunals explicitly has jurisdiction over legal persons such as corporations. Instead, they are based on the principle of individual (i.e. natural persons’) criminal liability, making human beings the only possible defendants when it comes to the core crimes these institutions have been established to prosecute. This state of affairs, however, does not result from a hypothetical conceptual impossibility around corporate liability under international law but rather, as in the case of the Rome Statute establishing the International Criminal Court, from complex

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37 See Doe v. Unocal (395 F3d 932 (9th Cir. 2002)). In the United States and France, out of court settlements were reached. In Belgium, charges were dropped. For a summary from the company’s perspective, see the FAQ section on Total in Myanmar’s webpage http://burma.total.com/myanmar-en/oil-and-gas-in-myanmar/oil-and-gas-in-myanmar-900130.html (visited 10 March 2015).

38 Skinner, McCorquodale and De Schutter, supra note 36.


40 Other aspects, which are not discussed in this article, include civil liability and nonjudicial accountability mechanisms. For a discussion on corporate international criminal liability, see R.C. Slye, ‘Corporations, Veils and International Criminal Liability’, 33 Brooklyn Journal of International Law (2008) 955–973.
negotiations among states. The final consensus was that it made more sense to focus on the less contentious principle of individual liability than to include corporate liability and take the risk to see some key states, which struggled with the very notion of corporate liability, not signing the treaty. In other words, and although this is how some domestic courts have interpreted the Rome Statute, the fact that corporate liability is not included in the Statute does not necessarily mean that the concept does not exist under international law. The Appeals Panel specifically relied on this point in the New TV S.A.L. Appeal Decision.

In truth, there is no conceptual reason why corporations should be immune from liability under international criminal law, and the idea has never been clearly rejected. Admittedly, until the New TV S.A.L. Appeal Decision, it has never been clearly embraced either. Instead, a closer look at both the law and the practice from a historical perspective reveals a mixed picture when it comes to the idea of corporate liability under international criminal law. Although the first international criminal tribunal, the pioneering International Military Tribunal at Nuremberg, only prosecuted individuals, they did label some groups — namely the Nazi leadership corps, the SS and the Gestapo — as 'criminal'. Hence the Tribunal recognized that legal persons can engage in criminal conduct. During the post-Second World War trials of German industrialists conducted by the United States in their zone of occupation of Germany, the idea of the responsibility of the corporations themselves was underlying, and transpires from some of the judgments. For example, the I.G. Farben tribunal remarked that:

[w]hile the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crimes enumerated in the indictment.

Historians have documented how even though only individuals were formally charged, and ‘even if corporate liability formally was not at

41 Art. 23 of the final Draft Statute produced by the Preparatory Committee before the start of the Rome Conference in 1998 contained two bracketed paragraphs envisaging the criminal liability of legal persons. See UN Doc. A/CONF.183/2/Add.1, at 49. This was eventually abandoned after intense negotiations reflecting a variety of views from states, and certainly not unanimity against the idea. See UN Doc. A/CONF.183/C.1/L.58, at 10. See also D. Stoichkova, Towards Corporate Liability in International Criminal Law (Intersentia, 2010).
42 For example, the US Court of Appeals for the Second Circuit in Kiobel v. Royal Dutch Petroleum Co. (621 F 3d 111 (2d. Cir. 2010)).
43 New TV S.A.L. Appeal Decision, supra note 14, § 66.
44 International Military Tribunal (Nuremberg), Judgement and Sentences (1 October 1946), reprinted in 41 American Journal of International Law (1947) 172.
these tribunals adopted an institutional approach. For example, the prosecution traced ‘responsibility on different levels of decision making instead of targeting only the head office’. Although the cases were against individual businessmen, in practice corporate and individual liability could not be strictly separated at all times.

The reality, therefore, is more complex than an outright rejection of the notion of corporate criminal liability under international criminal law, despite what a mere glance at the current tribunals’ statutes would otherwise suggest. In this context, the STL Appeals Panel’s jurisdiction decision in New TV S.A.L. — confirmed in Akhbar Beirut S.A.L. — in which for the first time an international tribunal envisaged the possibility of holding a corporation criminally liable, is of utmost symbolic importance, even if its scope is rather narrow.


In the New TV S.A.L. Decision of July 2014, the Contempt Judge concluded that the Tribunal did not have jurisdiction over legal persons. However, recognizing the importance of this matter, he also decided proprio motu to grant certification to the prosecution to appeal the following issue: ‘whether the Tribunal in exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60bis has the power to charge legal persons with contempt.’ Seizing this opportunity, the amicus prosecutor did appeal the Decision and aimed at demonstrating that the ‘tribunal has the power to charge legal persons with contempt’ and that ‘the contempt judge erred in ruling to the contrary.’

The prosecutor first argued that the Tribunal should be able to charge legal persons, because ‘the raison d’être of international tribunals is the fight against impunity, wherever it is found, including as to contempt.’ Specifically, the prosecutor contended that ‘international tribunals have repeatedly eschewed narrow, technical interpretations in favour of broader, pragmatic interpretations in the spirit of the fight against impunity, to carry out that fight as effectively as possible.’ Secondly, the Tribunal’s contempt power is wide, because it does not originate from the Tribunal’s Statute or from Rule 60bis. Rather, this power derives from the inherent powers of the Tribunal. Simply put, ‘[e]ven if Rule 60bis had never been adopted and did not exist, the crime of contempt would still exist and the Tribunal would still have full power and

47 Ibid.
48 New TV S.A.L. Decision, supra note 12, § 83.
50 Ibid., § 10.
51 Ibid.
jurisdiction to investigate, indict, prosecute and adjudicate such crimes.\footnote{Ibid., § 11.} In this context, the scope of the contempt power of the Tribunal is not limited by the Statute and exists independently from it. The Appeals Panel, while not providing any detailed explanation, seems to have accepted this reasoning when they concluded that ‘inherent jurisdiction over the crime of contempt, as opposed to crimes that fall within our primary jurisdiction, is outlined but not confined by Rule 60bis.’\footnote{New TV S.A.L. Appeal Decision, supra note 14, § 31.}

The core part of the New TV S.A.L. Appeal Decision is divided into two sections. One focuses on the Contempt Judge’s interpretation of Rule 60bis as excluding legal persons from contempt proceedings (‘whether the Contempt Judge erred in excluding legal persons when interpreting Rule 60bis’).\footnote{Ibid.} The other focuses on ‘whether the Contempt Judge erred in distinguishing between the Tribunal’s material, temporal and territorial jurisdiction on the one hand, and its personal jurisdiction on the other with respect to contempt proceedings.’\footnote{Ibid.} The Appeals Panel answered both questions in the affirmative, and upheld the Appeal. In Akhbar Beirut S.A.L., the Appeals Panel followed the findings of the New TV S.A.L. Appeal Decision. Hence, in the following sections the focus is on the New TV S.A.L. Appeal Decision.

\subsection*{A. Rule 60bis Does Not Exclude Liability for Legal Persons}

The discussion about Rule 60bis revolves around the interpretation of the words ‘those’ and ‘person’. Rule 60bis states that:

\begin{quote}
'The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice, upon assertion of the Tribunal’s jurisdiction according to the Statute. This includes, but is not limited to the power to hold in contempt any person who ...'
\end{quote}

The Rules themselves set out the rules for their own interpretation in Rule 3 (‘Interpretation of the Rules’) which reads:

\begin{quote}
(A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

(B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.'\footnote{Rule 60bis STL RPE. Emphasis added.}
\end{quote}
In the Appeal Decision, the Panel methodically went through the various aids to interpretation listed in Rule 3, starting with the Vienna Convention on the Law of Treaties. Article 33(4) of the Vienna Convention states that ‘when a comparison of the authentic texts discloses a difference of meaning...the meaning which best reconciles the texts...shall be adopted’.58 In the New TV S.A.L. Decision, the Contempt Judge referred to Articles 3(2) and (3), and 16 of the Statute, which concern the core crimes over which the Tribunal has jurisdiction and not contempt, and noted that they contain ‘gendered language’ (his/her). From that, the Contempt Judge concluded that the Tribunal only had jurisdiction over natural persons, including for contempt purposes, as only individuals, not legal persons such as corporations, can be said to have gender.59 The Appeals Panel asserted that the Contempt Judge’s interpretation was wrong on this point.60 While the English version does indeed contain gendered language, neither the French nor the Arabic versions contain such language, giving rise to a ‘difference of meaning’ between official versions. The Appeals Panel did not explicitly explain its reasoning but it seems as though what the judges meant was that in this context, drawing conclusions from the gendered language in the English version, as the Contempt Judge had done, leads to ignoring the neutral, wider language of the other two versions. By contrast, embracing the Arabic and French versions, as the Appeal Panel did, does not lead to ignoring the English version, as natural persons clearly remain included. Thus, a wider interpretation, one that does not rely on the gendered language of English ‘best reconcile[s] the texts’. The Panel’s interpretation, if this is indeed what they had in mind, is certainly daring since it leads to disregarding the gendered language in the English version. In any event, more clarity on the part of the Panel would have been welcome.

Article 31 of the Vienna Convention on the Law of Treaties states that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.61 For the Appeals Panel, the ordinary meaning of the term ‘person’ in a legal context ‘can include a natural human being or a legal entity (such as a corporation)’.62 This conclusion is in direct opposition to Judge Lettieri’s reasoning because for him, precisely, the context leads to the opposite conclusion, namely that the ordinary meaning of the word ‘person’ is exclusive of corporations.63 Developments at the international level, as well as domestic practice, constitute important elements of context, which both the Appeals Panel and, to a lesser extent the Contempt Judge, examined in turn.

With regard to ‘international standards on human rights’ as aids for interpretation, the Appeals Panel relied on the current trend, within international human rights law, to address corporate human rights

59 New TV S.A.L. Decision, supra note 12, § 63.
60 New TV S.A.L. Appeal Decision, supra note 14, § 39.
63 New TV S.A.L. Decision, supra note 12, §§ 74–75.
violations,\(^{64}\) and noted the existence of an ‘emerging shared understanding on
the need to address corporate responsibility’,\(^{65}\) as the adoption of the UN
Guiding Principles on Business and Human Rights in 2011 clearly

demonstrates. While contempt is not a human rights violation, the Appeals Panel

considered that recent developments of the law call for enhanced accountability

of corporations, inter alia through the development of ‘remedies’ for corpor-

ations’ ‘transgressions’.\(^{66}\) Adopting a decidedly more conservative (and pro-

accused) reading of the situation, the Contempt Judge contended that interna-

tional law does not support corporate liability at all.\(^{67}\) Undoubtedly, this is an

audacious move on the part of the Appeals Panel who extrapolated a great
deal from recent developments and could be said to have disregarded the need

for strict legality in the construction of criminal provisions, to the detriment

of the rights of the (corporate) accused in this case. While there is indeed an

international trend towards more corporate accountability in general, this
does not necessarily mean that such accountability, a rather loose term,

should include corporate liability for contempt, a precise offence — at least

when this type of responsibility is not explicitly foreseen in writing beforehand.

The Panel then proceeded to review state practice on corporate criminal li-

ability. The Contempt Judge had adopted a rather cautious reading of the existing

state practice with regard to corporate criminal liability, noting for

example, that he could not ‘discern a consensus’\(^{68}\) on this, but the Appeals

Panel disagreed with his assessment. The Appeals Panel dedicated no less

than thirteen paragraphs to a discussion on corporate criminal liability in dom-

estic systems and convincingly concluded that although there is some variety

from system to system, in a majority of them, corporations ‘are not

immune from accountability merely because they are a legal — and not a nat-

ural — person’.\(^{69}\) Moreover, ‘while international law has not evolved to the

stage where the subjection of a corporate person to criminal liability has

become imperative on States’, the Appeals Panel retain an inherent power

over contempt and therefore ‘need not be constrained by this fact’.\(^{70}\)

A commentator rightly noted that Rule 3 does not list state practice (other

than Lebanon’s) as one of the aids for interpretation the Tribunal ought to

make use of. She criticized the Panel’s decision to include such a lengthy dis-

cussion on it under the heading ‘international standards of human rights’,

arguing that ‘no solid reasoning is given as to why the contempt judge should

have taken ... [state practice] into account’.\(^{71}\) Clearly the Panel could have, and
perhaps should have, justified their choice better, as the link between what Rule 3 imposes them to do (rely on international standards on human rights) and what they did (rely on state practice with regard to corporate criminal liability) is not immediately apparent. That said, the trend towards enhanced corporate responsibility under domestic criminal law, even in areas other than human rights per se, definitely constitutes a significant aspect of the wider discussion on enhanced corporate accountability for human rights violations at the international level. For example, when John Ruggie, the former UN Secretary-General’s Special Representative on Business and Human Rights, was working towards developing what became the UN Guiding Principles on Business and Human Rights, corporate criminal liability and state practice in the area featured regularly in his work.72 Admittedly, the Appeals Panel delved into state practice without fully explaining the reasons why they were doing so. However, it is argued here that they were correct in examining such practice, and that their conclusion is also correct.

The Appeals Panel, still following Rule 3, then looked at the general principles of international criminal law and procedure. As mentioned in Section 2 above, the fact that no international tribunal has ever held corporations criminally liable as such results from policy choices, and chance, rather than from a genuine legal impossibility. Specifically with regard to contempt, the Appeals Panel noted that the absence of precedent before international tribunals cannot be interpreted as a bar to jurisdiction over legal persons for that offence, but simply illustrates the fact that the issue was never adjudicated.73 More generally, besides contempt, the fact that the International Criminal Court does not have jurisdiction over legal persons cannot be interpreted as an absolute bar to such jurisdiction before other international courts. The Appeals Panel’s conclusion on this point ought to have pleased the plethora of authors, claimants in Alien Tort Statute proceedings before United States federal courts, and supportive non-governmental organizations who have argued over the years, but with limited success, that the adoption of the Rome Statute does not mean that the discussion over the existence of corporate liability under international law is closed:74

While it remains true that no post-World War II International criminal court or tribunal has previously found that it had the authority to try legal persons, this singular fact does not convince the Appeals Panel that the term ‘person’ under Rule 60bis excludes legal persons

73 New TV S.A.L. Appeal Decision, supra note 14, § 41.
when seen through the prism and nature of the Tribunal’s inherent power to protect the integrity of its proceedings. Indeed, corporate liability for serious harms is a feature of most of the world’s legal systems and therefore qualifies as a general principle of law. Where States still differ is whether such liability should be civil or criminal or both. However, the Appeals Panel considers that, given all the developments outlined above, corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.\textsuperscript{75}

Finally, applying Rule 3(A)(iv), the Appeals Panel looked at Lebanese law. Due to the issue at stake — of whether the Tribunal has jurisdiction over corporations in contempt cases — the Panel took the liberty to look at the Lebanese Criminal Code, rather than the Lebanese Code of Criminal Procedure as Rule 3 suggests. The Panel, noting that Lebanese law recognizes corporate criminal liability, concluded that ‘it is foreseeable under Lebanese law that the owner of a journalistic publication or a television station could be either a natural or a legal person and could be criminally liable provided that actual complicity in the crime committed is proven.’\textsuperscript{76} Since New TV S.A.L. is a Lebanese company operating in Lebanon, this is a strong point, and one that the Appeals Panel perhaps should have relied on with more force given the weaker points the New TV S.A.L. Appeal Decision contains, such as its relying on state practice regarding corporate criminal liability.\textsuperscript{77} Had the company been of a different nationality and operating in a different country, this argument may have had less force but in the circumstances of the case it is relevant if not decisive.

Having gone through all the elements of interpretation outlined in Rule 3, the Appeals Panel concluded that Rule 60bis did not exclude jurisdiction over legal persons, such as corporations, and moved to the second part of their decision.\textsuperscript{78}

\textbf{B. Material Temporal and Territorial Jurisdiction Should Not Be Distinguished from Personal Jurisdiction with Respect to Contempt Proceedings}

The Appeals Panel dealt with that point in much fewer pages than the first point, related to Rule 60bis. In the Contempt Decision of July 2014, in the case against New TV S.A.L., the Contempt Judge argued that the Tribunal had indeed an inherent power to hold persons in contempt. Recognizing the reality of this inherent power, he further argued, leads to expanding the Tribunal’s

\textsuperscript{75} New TV S.A.L. Appeal Decision, supra note 14, § 67.
\textsuperscript{76} Ibid., § 71.
\textsuperscript{77} The Appeals Panel emphasized the point on Lebanese law more strongly in the Akhbar Beirut S.A.L. Appeal Decision, supra note 24, § 59.
\textsuperscript{78} New TV S.A.L. Appeal Decision, supra note 14, § 74.
material, temporal and territorial jurisdictions because not doing so would render the power meaningless. However, the same cannot ... be said with regard to personal jurisdiction. Irrespective of one's position as to the better policy ..., the fact that the Tribunal is not allowed to prosecute legal persons does not as such render its contempt power meaningless. The natural persons who comprise a corporation, no matter how high their position, can still be held responsible for interfering with the administration of justice and this makes the Tribunal's authority to deal with contempt and obstruction of justice effective.

Hence, the Contempt Judge argued that the contours of inherent jurisdiction should be as narrow as possible and that, essentially, prosecuting natural persons was effective enough. First, for the Appeals Panel, the distinction between material, temporal and territorial jurisdiction on the one hand, and personal jurisdiction on the other hand does not rest on solid ground. Indeed, it seems illogical to recognize an inherent power in the name of effectiveness while immediately limiting its scope to certain persons, thereby excluding legal persons. While not ignoring the fact that inherent jurisdiction should be narrow, they decided that restricting personal jurisdiction was unnecessary.

Secondly, the Appeal Panel and later the Contempt Judge himself in the Akhbar Beirut S.A.L. case rejected the argument that prosecuting natural persons is enough to fully prevent an impunity gap. As the Appeals Panel rightfully contended, 'many corporations today wield far more power, influence and reach than any one person.' Excluding them from the reach of the Tribunal and in essence shielding them from prosecution for contempt, therefore, makes little sense. Admittedly, and as the dissenting judge of the Appeals Panel noted, excluding corporations from the reach of the Tribunal would not have led to an impunity gap as such. This is because natural persons, as has indeed been the case in the contempt proceedings at stake here, can still be prosecuted, whether or not corporations can. In other words, a given offence against the administration of justice could still be addressed and punished. However, that does not mean that it would be ideal. Surely, the ideal solution is one where all the persons responsible are in fact prosecuted. Only then can it be said that the impunity gap was prevented. Interestingly, the Contempt Judge seems to have acknowledged that in his decision in the Akhbar Beirut S.A.L. case. Although this is not entirely clear, it appears that one of the reasons he put forward to drop the case against the company, and to distinguish this case from the case against New TV S.A.L. in which the Appeals Panel had clearly said that the Tribunal had jurisdiction over legal persons in contempt cases, was that in the case against Akhbar Beirut S.A.L., Mr Al-Amin, the newspaper's editor-in-chief and chairman of the board of

80 Ibid., § 67.
82 Ibid., § 82.
83 Ibid., § 84.
84 Judge Akoum's Dissenting opinion, supra note 15, § 8.
directors, is also an accused. Arguably, he meant that dropping the case against the company would not create an impunity gap because the most senior person in the company was also charged. By contrast, in the case against New TV S.A.L., the natural person also charged, Ms Karma Khayat, is ‘only’ Deputy Head of News and Political Programmes Manager, and not chairman of the board of directors. In other words, she does not represent New TV S.A.L. as much as Mr Al-Amin represents Akhbar Beirut S.A.L. Therefore, it could be said that leaving her as the only person facing the consequences of the collective actions of the company would be unfair and create an impunity gap. Although he did not explicitly say this, in distinguishing the two cases on this ground the Contempt Judge seems to have acknowledged that in certain circumstances not prosecuting legal persons for contempt may go against the interests of justice. In passing, it is interesting to note that in the Akhbar Beirut S.A.L. Appeal Decision, the Appeals Panel firmly rejected the idea that the two cases could be distinguished.

With this in mind, and given that the tribunal does have inherent powers to prosecute contempt, artificially limiting such powers to natural persons runs counter to the good administration of justice. As the first Contempt Judge noted in the indictment of January 2014:

It would not only be naïve but dangerous to accept that only natural persons can interfere with the administration of justice. To limit criminal liability for contempt to individual natural persons risks undermining the justice process; for the actual and most powerful culprits of any proved interference with justice would go untried.

The dissenting judge in the New TV S.A.L. Appeal Decision firmly disagreed with this reasoning, raising another argument based on the nullum crimen sine lege rule and on Rule 3(B) according to which any ambiguity that the various aids of interpretation outlined above have not successfully resolved ‘shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.’ In his opinion, these principles clearly stand in the way of the Tribunal’s asserting jurisdiction over corporate defendants. For the majority of the Appeals Panel, however, Rule 3(B) should only be resorted to if there is a remaining ambiguity that Rule 3(A) has not permitted to resolve. The majority’s reading of Rule 3(B) is consistent with their opinion that there is indeed no remaining ambiguity.

Clearly, the Appeal Panel adopted a wide view of the Tribunal’s inherent jurisdiction. Neither the Statute of the Tribunal, nor the Rules, explicitly give the Tribunal jurisdiction over corporations either in contempt proceedings or in any other proceedings. However, it is the essence of inherent powers that they exist outside of the texts. The raison d’être of inherent powers is that they

85 Akhbar Beirut S.A.L. Decision, supra note 17, § 73.
86 Akhbar Beirut S.A.L. Appeal Decision, supra note 24, §§ 66–68.
87 Orders in lieu of an indictment, supra note 6, § 28.
88 Rule 3(B) STL RPE.
allow a Tribunal to function properly. To do so, the Tribunal must be able to prosecute those who jeopardize its proceedings by revealing confidential information. The appeal decisions in New TV S.A.L. and Akhbar Beirut S.A.L. embrace that approach.


The Appeals Panel decision in New TV S.A.L. is the first decision in which an international criminal tribunal asserts jurisdiction over corporations. Just a few months later, its findings were confirmed in the Akhbar Beirut S.A.L. Appeal Decision. Undeniably, however, the New TV S.A.L. case is not the one business and human rights advocates might have dreamed of as they were patiently waiting for an international breakthrough in their field.90 First, it is coming from the Special Tribunal for Lebanon, which has very limited jurisdiction to begin with, and is an ad hoc tribunal, arguably with less universal appeal than the International Criminal Court, for example. Secondly, the decision is limited in scope, focusing only on contempt and not on the core crimes within the jurisdiction of the Tribunal. Thirdly, as discussed, the Appeals Panel did not always convincingly explain its (nonetheless rightful) decision to look into domestic practice with regard to corporate criminal liability. Finally, the decision came out as the Tribunal is operating in a difficult environment, which enhances the risk of its rather bold findings not receiving the attention, and even the praise, they deserve. As the dissenting judge in New TV S.A.L. emphasized, the work of the Tribunal is ‘already delicate’ and the Appeals Panels may have further complicated matters.91 The ease with which the two Appeal Panels have balanced the rights of the (corporate) accused, on the one side, and the need to exercise inherent jurisdiction to its full extent, on the other, can hopefully be overcome by the importance of the principle set in this case.

Despite its shortcomings, the New TV S.A.L. case may now undoubtedly be relied upon in future business and human rights litigation as proof that corporations may commit crimes which can be prosecuted at the international level. In other words, the Appeals Panel’s decision proves that corporate criminal liability under international law is not conceptually impossible. As such, the practical consequences of this decision should not be underestimated. For example, in the landmark business and human rights case Kiobel v. Royal Dutch Petroleum brought before United States courts under the Federal Alien Tort Statute, the US Court of Appeals for the Second Circuit asserted that

90 Verwiel and van der Voort (supra note 30) write: ‘[w]hile ... [they] do not oppose the development of corporate accountability for human rights violations and other violations of (international) law per se, this decision probably does not provide a strong legal basis for the future development of corporate criminal liability.’

91 Judge Akounis’ Dissenting opinion, supra note 15, § 27.
‘although international law has sometimes extended the scope of liability for a violation of a given norm to individuals, it has never extended the scope of liability to a corporation’. Building on this assertion, when the case reached the US Supreme Court, the governments of The Netherlands and the United Kingdom, among other institutions, presented a joint amicus curiae brief in support of the corporate defendant in which they forcefully argued that legal persons, such as corporations, are outside the scope of international criminal law.

The New TV S.A.L. Appeal Decision may be limited in scope but thanks to the case, it will now be easier for those hoping to bridge the corporate impunity gap to put aside the argument of the Court of Appeals for Second Circuit and the two governments. One international tribunal, the Special Tribunal for Lebanon, has extended the scope of liability to a corporation; thus the argument that international law has never done it is now factually incorrect, as is the opinion that corporations are outside the scope of international criminal law. It is a small step but it is a significant one.

It is too early to assess the long-term consequences of this decision. It is hoped that it will not remain an isolated one and that other courts, including domestic courts, will join in and start looking favourably upon corporate criminal liability under international law. From a human rights perspective, this development is long overdue and could have far-reaching effects. If only for advocacy purposes, the acknowledgement by an international tribunal that corporations can and do indeed commit crimes, is crucial.

92 Kiobel v. Royal Dutch Petroleum Co. (621 F3d 111, 120 (2d. Cir. 2010)). Emphasis in the original.
93 Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in support of the respondent (No. 10-1491) (filed 3 February 2012), at 17–20.